**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

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**Bypass Appeal from the Oakland Circuit Court**

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**ARTHUR Y. LISS** and **BEVERLY LISS**,

*Plaintiffs-Appellees*,

-vs-

**LEWISTON-RICHARDS, INC.**, a Michigan Corporation, and **JASON P. LEWISTON**

*Defendants-Appellants*,

and

LEWISTON-RICHARDS, INC.,

*Counter-Plaintiff*,

-vs-

ARTHUR Y. LISS and BEVERLY LISS,

*Counter-Defendants*.

_____/

Supreme Court No. 130064

Court of Appeals No. 266326

Oakland County Circuit Court
No. 03-046587-CK

Honorable Fred M. Mester

# REPLY BRIEF OF APPELLANTS

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# INTRODUCTION

In their opening brief, Defendants/Appellants Lewiston-Richards, Inc and Jason Lewiston (collectively, "LRI"), discussed the issue previously raised in their application for leave to appeal. This Court granted leave to consider that issue, which bears repeating:

> Should this Court hold that licensed residential builders are exempt from liability under the Michigan Consumer Protection Act when engaged in conduct authorized by and regulated by the Occupational Code? (LRI Brief at vi)[1]

The same issue is raised in *Hartman & Eichhorn Building Co, Inc v Dailey*, SC No. 129733, although that case does present another issue not raised here. The quoted issue bears repeating because Plaintiffs/Appellees Arthur and Beverly Liss counter-state a second issue that this Court has not agreed to hear. The purported second issue is "Whether Defendants met their burden of proving their claimed exemption as required by §4(4) of the MCPA?" (Liss Brief at vii).

This Court did not agree to hear a §4(4) issue, nor should it. The dispute between the Lisses and LRI has not been tried. Summary disposition was denied to LRI on the §4(1)(a) issue because the circuit court was bound by *Hartman*. If this Court holds that licensed residential builders are exempt from liability under the MCPA when engaged in a transaction authorized and regulated by the Occupational Code, LRI will easily show that the Lisses' allegations, stripped of artful pleading verbiage, fall squarely within the exempt "general transaction." In any event, that question has yet to be addressed by the circuit court, so this Court has no decision to review and no record on which to base a decision.

On the granted appeal issue, the Lisses now admit that *Smith v Globe Life Ins*, 460 Mich 446 (1999), sinks their ship. Rather than take issue with LRI's *Smith*-based arguments, the Lisses have launched a frontal assault on *Smith* and the alleged—albeit unproven—"havoc and

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[1] LRI altered the wording of its issue slightly after leave was granted to reflect the changed circumstances, but made no substantive change to the issue stated.

upheaval wrought by *Smith*" (Liss Brief at 41). The present case and *Hartman*, if the Lisses' new counsel have their way, will become vehicles through which to attack and overrule *Smith*. The Lisses are now conduits for the views of the Consumer Law Section of the State Bar of Michigan, whose leaders have been arguing for years, without any empirical evidence, that *Smith* "gutted" the MCPA.[2] Their new appellate counsel is a recent past chair of the Section. The Section itself appears as an amicus on their behalf. Their appendix features an article written by a Section council member, said to be an author of the MCPA, concerning why this Court's decision in *Smith* is "clearly erroneous and totally illogical" (Liss Apx 91b).

The Lisses' fall-back position, if the Court declines to repudiate *Smith*, is a request that it be limited strictly to the insurance industry. They argue that the insurance industry is more pervasively regulated than the residential building industry (or, indeed, any other regulated industry). To so limit *Smith*, the Court would need to overrule every appellate decision since 1999 applying *Smith* to a regulated transaction not in the insurance industry. In this reply brief, LRI argues that *Smith* should be retained and that its effect is neither limited to the insurance industry nor so far reaching as to block MCPA claims where they are needed.

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[2] Gary M. Victor, "The Michigan Consumer Protection Act Twenty Five Years After and What Is Left After *Smith v Globe*?" (2004 article posted on the website of the Consumer Law Section) at 2. From the same page:

> When the Supreme Court took on a conservative majority, and what some have argued to be an activist pro-business agenda, the days of the MCPA as a white knight for protecting consumer's rights were numbered. In *Smith v Globe Life Insurance Co*, the new Court's first major case interpreting the MCPA, the Supreme Court rendered a decision which was totally inconsistent with both the plain wording of the act and its legislative purpose. ***Under Smith some, perhaps many or even all regulated businesses may be exempt from liability under the MCPA***. (Victor, What Is Left After *Smith*, at 2; footnotes omitted; emphasis added).

In Mr. Victor's view, when the MCPA is properly construed, "***[t]he breadth of the MCPA prohibitions is so great that it is arguable that almost any breach of contract will be a violation of the Act.***" (Victor, What Is Left After *Smith*, at 5; emphasis added).

## I. The Lisses pay lip service to the standards for applying the plain language of an unambiguous statute, but then, without identifying an ambiguity, rely on a drafter's opinions about what the legislature intended

The Lisses accurately describes the review standards this Court applies when it considers the meaning of statutory language (Liss Brief at 13-14, 17-18). The gist is that courts must apply the intent expressed in unambiguous language and that "no further judicial construction is required or permitted." *Garg v Macomb County Community Mental Health Serv*, 472 Mich 263, 281 (2005), quoting *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402 (2000). It is puzzling, therefore, why the Lisses have included the "background" subsection of their "legislative intent" section (Liss Brief at 20-24). They do not say that the statute is ambiguous or identify any ambiguity. Nonetheless, they launch into a discussion of a drafter's opinion—not legislative history at all—as though the statutory language was not susceptible to a plain reading. They acknowledge that this discussion is "not binding" (*id.* 22), but in fact they are asking for a kind of construction that they know is neither "required [n]or ***permitted***." *Garg*, 472 Mich at 281.

The Lisses next argue that the MCPA is a remedial statute that must be broadly construed to provide coverage, with its exemptions narrowly construed to achieve the same end (*id.* 22-24). Putting aside the support for this proposition, which consists mostly of cases from other jurisdictions construing other so-called "UDAP" statutes,[3] the argument is flawed because no

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[3] As the Lisses' principal secondary authority explains, "UDAP" is an acronym for "unfair or deceptive acts or practices." National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (6th ed 2004), at §1.1. *Unfair and Deceptive* is one volume in what NCLC calls its "Deception and Warranties Library," part of its "Consumer Credit and Sales Legal Practice Series." The Lisses have included a section of text and all of Appendix A from *Unfair and Deceptive* in its appendix (Liss Apx 16b-46b). NCLC uses the term "UDAP" to refer "somewhat imprecisely" to all statutes listed in Appendix A, "whether the legislation proscribes unfair, unconscionable, deceptive, misleading, or even simply fraudulent practices. This terminological convenience is necessitated by the lack of any other common name for such statutes." *Unfair and Deceptive* at §1.1. Sections of *Unfair and Deceptive* quoted in this brief are attached at Tab A. (LRI notes that nothing in the Lisses' appendix after page 15b was part of the record below.)

"construction"—whether broad or narrow, liberal or conservative—is required or permitted absent some ambiguity in the statute. Again, the Lisses stress that there is no ambiguity (*id.* 18).

## II. The Lisses read "transaction or conduct" as though the statute said "transaction *and* conduct"

The Lisses acknowledge that the word "or" refers to a choice or alternative between two things, in this case "transaction or conduct," yet then conclude that courts must consider "not just the 'general transaction' but, also, the 'conduct' involved" (Liss Brief at 17). In other words, "or" means "and." This, of course, by itself would undo the principal holding of *Smith*:

> [T]he relevant inquiry is ***not*** whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, ***regardless of whether the specific misconduct alleged is prohibited***. *Smith*, 460 Mich at 465 (emphasis added).

The statute uses "conduct" because the Exemption applies if *either* the transaction *or* the conduct is specifically authorized as provided in §4(1)(a). The Lisses would write "transaction or" out of the statute, and limit the Exemption to specifically authorized conduct only. This suits the Lisses' purpose of characterizing alleged contract breaches as "misrepresentations" (Liss Brief at 37-38), and then asserting that the alleged conduct—or "transactions" as the Lisses name them with *Smith* in mind—is not "specifically authorized"[4] but rather specifically prohibited (*id.* 38). Here are some examples of what the Lisses label as "transactions" in this case:

> misrepresenting the characteristics, uses and benefits of the residence; misrepresenting the standard, quality, and grade of the residence, failing to

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[4] The Lisses, using Illinois law, argue that the phrase "specifically authorized" means formal, explicit law directed to the precise conduct in question, citing *Bober v Glaxo Wellcome, PLC*, 246 F3d 934 (7th Cir 2001) (Liss Brief at 26-27). A more recent and more authoritative view of Illinois law, not cited by the Lisses, is to be found in *Price v Philip Morris, Inc*, 219 Ill 2d 182, 848 NE2d 1, 302 Ill Dec 1 (2005), which discusses *Bober* at length. In *Price*, the Illinois Supreme Court reversed a multi-billion dollar judgment against a maker of "light" and "low tar" cigarettes, finding the defendant exempt under the Illinois Consumer Fraud Act because the FTC's "informal regulatory activity" satisfied the CFA's requirement of specific authorization "by laws administered by" a regulatory body. 219 Ill 2d at 258, 848 NE2d at 46.

complete the construction of the residence; and making material misrepresentations and/or failing to advise of material information . . . (*id.* 38).

*Smith* rejects the idea that such alleged misconduct can be "transactions" as the statute uses the term. 460 Mich at 465. The LRI/Liss transaction was a contract to purchase a newly constructed house. But the Losses' "transactions" are a list of complaints, pleaded as misrepresentations.

## III. The construction and sale of a residence is not exempt because the builder is licensed, but because the transaction is specifically authorized and pervasively regulated

Just as the plain language of the Exemption cannot be read to make every alleged breach or misrepresentation a distinct "transaction," neither can it be read to exempt "entire classes of defendants" (Liss Brief 15; argument caption) without regard to the transaction between the parties. The statute should not be viewed through either a telescope or a microscope.

LRI is not exempt in this case merely because it is a licensed residential builder. LRI agrees with the Losses that "mere proof that an entity is licensed or regulated is not sufficient to prove an exemption under §4(1)a)" (Liss Brief 30, argument caption), but disagrees with the argument following that caption (*id.* 30-36). Whether the Exemption applies, by its own terms, is a function of the transaction and not a question of licensure. The Losses' argument is drawn primarily from Ohio and New Jersey law, but the perfect illustration is right at hand in Michigan.

In *Attorney General v Diamond Mortgage Co*, 414 Mich 603 (1982), a defendant's licensed, regulated status did not insulate it from an MCPA claim. Defendant was a real estate broker, but the transaction at issue was mortgage writing. The mortgage writing transaction was ***not*** specifically authorized under the real estate broker's license. *Smith* itself notes the distinction, 460 Mich at 464. In the present case, LRI was doing exactly what it was licensed to do—building a personal residence and selling it to a homeowner. It is this transaction that is exempt under §4(1)(a), and not some blanket exemption to LRI based on its licensed status.

The Lisses, as noted above, depend heavily on cases from Ohio and New Jersey for their argument (Liss Brief at 31-36, 2; Liss Apx at 47b-79b). *Elder v Fischer*, 129 Ohio App 3d 209, 717 NE2d 730 (1st Dist Ct App 1998), *lv den* 84 Ohio St 3d 1434 (1998); *Lemelledo v Beneficial Management Corp*, 150 NJ 255, 696 A2d 546 (1997). Both decisions are mainstream consumer protection cases. In *Lemelledo*, low income borrowers were alleged to be victims of "loan packing," the systematic bundling of credit insurance premiums into loan packages under coercive circumstances. In *Elder*, low income Medicaid recipients in a residential care facility were allegedly forced to sign contracts for improper and retroactive charges and billed for services that were paid for by the state.

In contrast, LRI and the Lisses entered into an arms' length agreement in 2000 (Liss Apx 1b-15b) for the sale of a $2.2 million "spec" home (*id.* 15b) already under construction at the time the contract was made. Arthur Liss is an experienced practicing attorney. The estimated date for substantial completion was September 1, 2001, plus any extensions, including delay resulting from "any act omission, neglect or default of Buyer, or any person engaged by Buyer" (*id.* 1b, ¶4). The parties closed and the Lisses took possession of their home on January 14, 2003 (LRI Apx 65a, ¶9). The Lisses will have resided in their home for four years by the time this appeal is decided, but they allege that their home was never "substantially completed" and that they are entitled to $500 per day under the contract (Liss Apx 2b, ¶4) for years past and on into the future. LRI alleges that all delay was caused by "acts, omissions and delays caused by" the Lisses (*id.* ¶8), that the home was substantially complete by the estimated date, plus extensions, and that the Lisses are entitled to nothing under paragraph 4 of the contract.

Because the case is untried, this Court has only the Lisses' allegations (LRI Apx 49a-62a

and 111a-112a) and LRI's counter-allegations (*id.* 63a-72a).[5] It is clear from the parties' contract alone, with its penned, negotiated interlineations (Liss Apx 1b, 3b, 7b, 13b), that this dispute is quite unlike most consumer protection cases, as typified by *Elder* and *Lemelledo*.

Apart from the fundamentally different nature of the actions, *Elder* and *Lemelledo* are applying different statutes. The Lisses write as though all so-called UDAP statutes were the same, but "UDAP" is just a convenient label for a wide variety of statutes. The Lisses use these two cases to argue that, when a statute exempts "specifically authorized" transactions, the exemption applies only when there is a direct conflict between the application of the consumer fraud statute and the regulatory scheme (Liss Brief at 2, 23). But the New Jersey and Ohio statutes do not use the same exemption as the MCPA.

In *Elder*, Ohio's intermediate appellate court held that the billing practices of the defendant residential care facility were covered by the Ohio Consumer Sales Protection Act. The court noted that the CSPA listed a number of industry- and profession-specific exclusions (Liss Apx 53b-54b; *see* 31b), none of which could be construed to cover the defendant:

> We note that the legislature specifically excluded certain health-related transactions from the "consumer transactions" afforded protection under the CSPA. It did not, however, specifically exclude health-care, nursing-home, or residential-care facilities." 129 Ohio App 3d at 215 (Liss Apx 54b)

The court, applying the maxim *expressio unius est exclusio alterius*, held that it could not add to the legislature's list of industries and professions whose transactions with their customers, clients and patients were excluded from the definition of "consumer transaction" (*id.*). The court relied heavily on *Lemelledo* (Liss Apx 57b-58b [misnumbered 67b-68b]), and its statement that

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[5] The circuit court has dismissed with prejudice the Lisses' Count VII for negligent infliction of emotional distress (LRI Apx, 44a). The circuit court also has granted summary disposition against the Lisses' Count II (breach of escrow agreement), Count V (violation of the Building Contract Fund Act), and Count VI (specific performance) in an order dated January 11, 2006. The remaining counts are breach of contract, breach of warranty, and MCPA violations.

"UDAP" remedies should apply unless "a direct and unavoidable conflict exists between the application of the CFA and application of the other regulatory scheme or schemes" (*id.* 58b, quoting *Lemelledo* at 75b). The Lisses would have this Court replace *Smith*'s general transaction test by limiting the §4(1)(a) Exemption to direct and unavoidable conflicts (Liss Brief 2).

In *Lemelledo*, the defendant loan company argued that its "loan packing" practices were exempt from the New Jersey Consumer Fraud Act because lenders offering credit insurance are regulated by several state agencies. The court was not dealing with statutory language like the Exemption in Michigan's statute, but rather was responding to the argument that regulation under both the CFA and state agencies could "impose potentially inconsistent administrative obligations on regulated parties" (Liss Apx 72b). The court focused specifically on possibly conflicting remedies (*id.* 73b-75b), not on statutory exemption language like Michigan's, which focuses on whether the transaction or conduct is specifically authorized, not whether dual regulation might result in inconsistent remedies.[6]

Rhode Island's "UDAP" statute has an exemption more closely resembling Michigan's. The Rhode Island Deceptive Trade Practices Act exempts "actions or transactions permitted under laws administered by the department of business regulation or other regulatory body or officer acting under statutory authority of this state or the United States." Rhode Island Gen Laws 1956, §6-13.1-4. In *Kondracky v Crystal Restoration, Inc*, 791 A2d 482 (RI Sup Ct 2002), the Rhode Island Supreme Court held this exemption precluded a DTPA claim by home purchasers who, like the Lisses, alleged their contractor had breached warranties and engaged in deceptive practices. Because the contractor was regulated by a state regulatory board, its

[6] The Washington case cited by the Lisses (Liss Brief at 23-24) is inapposite for the same reason. *Edmonds v John Scott Real Estate, Inc*, 87 Wash App 834, 942 P2d 1072 (1997). Washington's statute contains no exemption like Michigan's. *Id.* 844, 942 P2d at 1077, citing RCW 19.86.170.

activities were not covered by the statute. *Id.* 484, *following State v Piedmont Funding Corp*, 191 RI 695, 699, 382 A2d 819, 822 (RI Sup Ct 1978).

In *Piedmont*, the Court held that companies selling insurance and investment programs were exempt from DTPA claims because they were regulated by various governmental agencies and regulatory bodies, including the office of the insurance commissioner and the SEC. 191 RI at 699-700. The Court rejected a contention that the exemption applied only if "the regulating agency has established that the manner in which the transaction was conducted is a proper way of doing business." *Id.* 698-699. This parallels the Lisses' argument that the Exemption applies only "where the conduct complained of has been specifically approved or is specifically required" (Liss Brief at 27). In both instances the argument cannot be squared with the plain language of the statute: "[W]e follow the rule of construction which requires that the language in a statute be given its plain and everyday meaning." *Id.* 699. Because the defendant's activities were regulated by state and federal bodies, they were outside the ambit of the statute. *Id.* 700. *Accord, Lynch v Conley*, 853 A2d 1212 (RI Sup Ct 2004) (sale of property without disclosure of paint contamination not covered by statute because otherwise regulated).

Other jurisdictions have reached the same result when applying similar statutory exemption language. Several examples are cited in the appellant's reply brief in *Hartman*, the companion case, including New Hampshire (*Averill v Cox*, 145 NH 328, 761 A2d 1083 (2000) (renouncing a former narrow construction in favor of a broader construction of an exemption provision)); Georgia (*Ferguson v United Ins Co of America*, 163 Ga App 282, 293 SE2d 736, 737 (1982) (insurance)); Maine (*First of Maine Commodities v Dube*, 534 A2d 1298 (Maine 1987) (real estate broker)); Nebraska (*Little v Gillette*, 218 Neb 271, 354 NW2d 147 (1984) (banking and real estate broker)); and Idaho (*Irwin Rogers Ins Agency, Inc v Murphy*, 122 Idaho

270, 833 P2d 128, 134 (1992) (insurance)). *See also Connelly v Housing Authority*, 213 Conn 354, 360, 567 A2d 1212, 1215 (1990) (municipal housing authority).

## CONCLUSION AND RELIEF REQUESTED

The Lisses have dressed up their breach-of-contract claims in MCPA clothing to obtain unwarranted attorney fees and recover damages for frivolous misrepresentation allegations. If they have a claim, it is a contract claim.[7] If they have been damaged, contract damages will make them whole. If LRI has not met its responsibilities under the Occupational Code, the appropriate regulatory authority should handle it. The Court need not undo the sound precedent of *Smith* out of concern that parties like the Lisses lack adequate remedies. Their contract and warranty claims, coupled with their state administrative proceeding, give them more than ample opportunities to vent their complaints about LRI and its alleged role in delaying completion of their home. LRI looks forward to proving who caused the delay in completing the Lisses' residence. The Court should adhere to *Smith*, which applies §4(1)(a) according to its plain language, and reverse in *Hartman* on the Exemption issue. Because the Lisses now concede that their MCPA claims cannot survive *Smith*, and with the *Hartman* error corrected, the Court should reverse and remand this case for trial on the contract and warranty claims.

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[7] Even *Unfair and Deceptive*, at §5.2.5.1, acknowledges that a mere breach of contract is not a UDAP violation, without aggravating circumstances (Tab A).